

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
YEMISI AKINYEMI,

PLAINTIFF,

5 Case No:
6 07CV 4048 (CM) (AJP)

7 -against-

8 MICHAEL CHERTOFF, Secretary,
9 Department of Homeland Security,

DEFENDANT.

10 -----X
DATE: October 29, 2007
11 TIME: 10:55 a.m.

12
13 EXAMINATION BEFORE TRIAL of the
14 Defendant, MICHAEL CHERTOFF, Secretary,
15 Department of Homeland Security, by BRENDAN
16 McPHAIL, taken by the Plaintiff, pursuant to
17 Notice, held at the U.S. Attorney's Office
18 Southern District of New York, 86 Chambers
19 Street, New York, New York 10007, before a
20 Notary Public of the State of New York.
21
22
23
24
25

2 A P P E A R A N C E S:

3

4

5 LAW OFFICES OF K.C. OKOLI, PC
Attorney for Plaintiff
6 330 Seventh Avenue, 15th Floor
New York, New York 10001
7 BY: K.C. OKOLI, ESQ.

8

9 MICHAEL J. GARCIA, ESQ.
United States Attorney for the
10 Southern District of New York
U.S. Department of Justice
11 Attorney for the Defendant
86 Chambers Street
12 New York, New York 10007
BY: JOHN D. CLOPPER, ESQ.
13 Assistant U.S. Attorney

14

15

ALSO PRESENT:
16 MELANIE ACEVEDO, ESQ.
U.S. Customs and Border Protection
17 RALPH TALARICO, ESQ.
The National Treasury Employees Union
18

19

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21

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25

2 B R E N D A N M c P H A I L, called as a
3 witness, having been first duly sworn by a
4 Notary Public of the State of New York, was
5 examined and testified as follows:

6

7 EXAMINATION BY

8 MR. OKOLI:

9 Q. Please state your name for the
10 record.

11 A. Brendan McPhail.

12 Q. Where do you reside?

13 A. 177 Edgewood Drive, Orangeburg, New
14 York 10962.

15 Q. Good morning.

16 A. Hello.

17 Q. My name is K.C. Okoli. I represent
18 Yemisi Akinyemi in this lawsuit.

19 And I will be asking you a couple
20 of questions in connection with the lawsuit.
21 What I ask of you is your best recollection.
22 If I ask a question and you don't understand
23 the question, please let me know and I will
24 either rephrase the question or ask it in such
25 a way that you do understand.

1

McPHAIL

2

A. Not really. Not on the job.

3

Q. Do you have a middle initial?

4

A. I do.

5

Q. And what's your middle initial?

6

A. L.

7

Q. And what does it stand for?

8

A. Luke.

9

Q. And where is your place of birth?

10

A. What hospital?

11

Q. No, no, no --

12

A. Bronx.

13

Q. Okay.

14

A. Bronx, New York.

15

Q. And just for the record, what is

16

your race?

17

A. What's my race?

18

Q. Yes.

19

A. Irish-American.

20

Q. I wasn't trying to be facetious,

21

the thing is this document, somebody will see

22

it and I know, of course I know, everybody here

23

can look at you and see what it is, at least

24

guess, but the people who read this are not

25

able to do that.

1

McPHAIL

2

A. Okay.

3

Q. So, sometimes I will ask these

4

questions, it's just that we are making a

5

record.

6

A. Okay.

7

Q. And are you currently employed?

8

A. Yes.

9

Q. And who's your employer?

10

A. Customs and Border Protection.

11

Q. What's your highest of level of

12

education?

13

A. Four year degree from college.

14

Q. Sorry?

15

A. Four year degree from college.

16

Q. And which college was that?

17

A. Okay, the first two years at Iona,

18

and two years at FAU, at Florida Atlantic

19

University, down in Boca Raton, Florida.

20

Q. Since when did you become employed

21

by the Customs and Border Protection?

22

A. What year?

23

Q. Yes.

24

A. 1984.

25

Q. When you became first employed,

1

McPHAIL

2

A. I think it was Loraine Spina.

3

Q. Do you know what Ms. Spina's title

4

was at the time?

5

A. She was my supervisor.

6

Q. I'm talking of her official title,

7

do you know what her official title was?

8

A. Official meaning what, sir?

9

Q. CBP title.

10

A. I guess SCI Lorraine Spina.

11

Supervisor Customs Inspector Loraine Spina.

12

Q. Do you know Yemisi Akinyemi?

13

A. Yes, I do.

14

Q. How did you come to know Yemisi

15

Akinyemi?

16

A. She worked at DAU with me.

17

Q. When you say DAU --

18

A. Well, I'm sorry, DAU or BSC.

19

It is used to be the Document

20

Analysis Unit and then they switched it to

21

Business Service Center. But they both the

22

same.

23

Q. So, DAU is the same thing as BSC?

24

A. BSC.

25

Q. Did you and Ms. Akinyemi share the

1 McPHAIL

2 Border Protection officers profile Nigerians at
3 Newark International Airport?

4 MR. CLOPPER: Objection.

5 That question calls for information
6 covered by the law enforcement privilege
7 and I'm going to instruct the witness
8 not to answer.

9 Q. Do you recall being questioned by
10 an EEO officer in connection with
11 Ms. Akinyemi's complaint?

12 A. Yes.

13 Q. Do you recall providing an unsworn
14 statement to the person who questioned you?

15 A. Excuse me?

16 Q. Do you recall providing a statement
17 to the person who questioned you?

18 A. Over the phone.

19 Q. Did you ever have occasion to
20 review the statement which you provided?

21 A. Yes.

22 Q. Did you ever sign any statement,
23 unsworn statement, that you provided?

24 A. I signed at the bottom copy, I
25 think so.

1 McPHAIL

2 Q. Okay, before you signed, did you
3 read the questions and answers on the document
4 that you signed?

5 A. Yes.

6 MR. OKOLI: I would like to have
7 marked for identification for today's
8 deposition a three-page document, I
9 believe Bate numbered 73 to 75.

10 (Whereupon, the aforementioned Copy
11 of Unsworn Declaration of Brendan L.
12 McPhail, Three Pages was marked as
13 Plaintiff's Exhibit 1 for identification
14 as of this date by the Reporter.)

15 Q. I'm placing before you what is
16 marked Plaintiff's Exhibit 1 for identification
17 at this deposition (handing), I will ask you to
18 review the document and tell me if you
19 recognize what it is.

20 A. (Witness perusing document.)

21 Q. What do you recognize it to be?

22 A. These are the questions she asked
23 me over the phone.

24 Q. Is it your initials on the first
25 page of the document; is that your initials?

1 McPHAIL

2 A. That's correct.

3 Q. And did you make the correction
4 "Customs and Border Protection officer" on that
5 first page, is that your handwriting -- at the
6 bottom of it, something is written in hand,
7 something is crossed out --

8 A. You know, I don't know where that
9 came from. I didn't do it.

10 It looks like my writing, though,
11 but I don't remember doing that. It looks like
12 my writing.

13 Q. Now, on the second page, do you
14 have your initials as well?

15 A. Yes (indicating).

16 Q. And on the last page, is that your
17 signature?

18 A. Yes (indicating).

19 Q. Okay, thank you.

20 MR. OKOLI: I would like us to call
21 the judge on this.

22 MR. CLOPPER: Okay, I'm sorry, on
23 what; on my objections?

24 MR. OKOLI: Yes.

25 MR. CLOPPER: Well, let's take a

1 McPHAIL

2 break and see if we can talk about it
3 for a moment. Let me speak with my
4 co-counsel and we will come back to it.

5 MR. OKOLI: Okay.

6 MR. CLOPPER: Off the record.

7 (Whereupon, an off-the-record
8 discussion was held.)

9 MR. CLOPPER: Could we read back
10 the last pending question, the question
11 that was objected to.

12 (Whereupon, the referred to
13 question was read back by the Reporter.)

14 MR. CLOPPER: I objected to that
15 question, and I continue to object to
16 that question.

17 And then Mr. Okoli, you raised the
18 issue of Officer McPhail's declaration
19 here, I will allow you to ask him a
20 question about what he meant by his
21 statements in his declaration, you
22 wanted to do that.

23 MR. OKOLI: No, that's not what I
24 wanted.

25 I wanted an answer to my question.

1 McPHAIL

2 If you are still objecting, then we need
3 to call the judge. If you want to
4 withdraw your objection, then you are
5 entitled to do so, but if you are
6 insisting on your objection, then I want
7 a judge's ruling on the objection.

8 MR. CLOPPER: Let me think about
9 this. Give me a minute.

10 Let's go off the record.

11 (Whereupon, an off-the-record
12 discussion was held.)

13 MR. CLOPPER: Let's go back on the
14 record.

15 I'm going to allow the witness to
16 answer this question, subject to what he
17 personally knows about.

18 And I would direct the witness in
19 his answer not to reveal any
20 investigative techniques or other
21 sensitive law enforcement information.

22 Other than that, I will allow him
23 to answer the question.

24 MR. OKOLI: Could you read back the
25 question to the witness.

1 McPHAIL

2 (Whereupon, the referred to
3 question was read back by the Reporter.)

4 A. And what did I say in that?

5 Q. It's not what you said here, it's
6 the question that you have been asked.

7 A. Well, assuming -- I would assume
8 they profile. But I have no knowledge of that.
9 I am not in targeting. I never was into
10 targeting. I would just assume they would
11 profile.

12 Q. What is your basis for your
13 assumption?

14 A. Well, being Nigeria is a source
15 country.

16 Q. When you say --

17 A. There's drugs coming out of the
18 Nigeria.

19 Q. So, your assumption is based solely
20 on the fact that drugs come out Nigeria?

21 A. From the country.

22 MR. CLOPPER: Objection.

23 It mischaracterizes the witness's
24 testimony.

25 Q. Is there anything else that you

1 McPHAIL

2 base your assumption on?

3 A. No.

4 Q. As a CBP officer, have you
5 participated in the profiling of Nigerian
6 passengers?

7 MR. CLOPPER: Objection.

8 A. No.

9 Q. I am placing back before you in
10 Plaintiff's Exhibit 1 (handing).

11 In your answer at 074, when you
12 say, "We profile Nigerians," just that
13 statement, "We profile Nigerians," what do you
14 mean?

15 MR. CLOPPER: Objection.

16 As I said before, I'm going to
17 allow the witness to answer the
18 question, to the extent he has personal
19 knowledge.

20 I would caution the witness --

21 MR. OKOLI: No, you can't make a
22 speaking objection, please. You can't.

23 I mean, if you want, we can call
24 the judge.

25 I'm asking a very clear question.

1 McPHAIL

2 He reviewed the document and he
3 signed it, he corrected something, he
4 didn't strike that, and that's what I'm
5 following up on.

6 So, if you are going to make a
7 speaking objection, we are going to call
8 the judge.

9 MR. CLOPPER: I am not making a
10 speaking objection. I am simply
11 cautioning the witness not to reveal any
12 law enforcement privileged information.

13 MR. OKOLI: Shall we just call the
14 judge.

15 MR. CLOPPER: I will allow him to
16 answer.

17 MR. OKOLI: We will go head.

18 Q. What do you mean when you say, "We
19 profile Nigerians"?

20 A. I don't remember saying that, sir,
21 that we...

22 Q. Is that your initial at the bottom
23 of the --

24 A. Okay, okay. Let me see.

25 Okay, well, maybe I shouldn't have

1 McPHAIL

2 said that, because I have no knowledge of how
3 to target, I never worked in a targeting unit.

4 I'm just assuming. It's all an
5 assumption on my part when the question was
6 asked to me over the phone.

7 Q. But after the question as was posed
8 to you over the phone, you had an opportunity
9 to review --

10 A. Yes.

11 Q. -- this document before you signed
12 it?

13 A. Right.

14 Q. And you also had an opportunity to
15 correct what may have been incorrect?

16 A. Okay.

17 Q. And you, in fact, did correct
18 something on page one?

19 A. Well, that, I don't remember
20 correcting, but it looks like my handwriting.

21 Q. Very well.

22 A. Okay.

23 Q. So, here, in your answer, you did
24 not say you were assuming, correct; in your
25 answer to question --

1 McPHAIL

2 A. Yes, but, sir, I have no knowledge
3 of who they target. I don't work in the
4 targeting unit.

5 Q. Now --

6 Are you done with your answer?

7 A. Yes.

8 Q. Okay.

9 So, again, to come back to the
10 point, what is the basis for your assumption
11 that Nigerians are profiled?

12 A. Because --

13 MR. CLOPPER: Objection.

14 Asked and answered.

15 Sorry about that, you can go ahead
16 and answer, to the best of your ability.

17 A. Because it's a source country.

18 Q. And when you say, "it's a source
19 country," what does that mean?

20 A. For drugs.

21 Q. What does that mean?

22 A. Well, drugs come from Nigeria.

23 Q. Okay.

24 So, do you assume that because
25 drugs come from Nigeria, every Nigerian is

1 McPHAIL

2 connected in the drug trade?

3 A. Not at all.

4 MR. CLOPPER: Objection.

5 Q. Sorry?

6 A. No, I don't think that at all.

7 Q. You do not know whether

8 Ms. Akinyemi's husband was profiled?

9 A. No, I have no idea.

10 Q. On the occasions that you worked at
11 the airport, did you ever overhear any
12 conversation by any customs officer concerning
13 Nigerians and drug smuggling?

14 MR. CLOPPER: Objection.

15 That question calls for information
16 covered by the law enforcement privilege
17 and I'm instructing the witness not to
18 answer.

19 MR. OKOLI: Shall we call the
20 judge, please.

21 MR. CLOPPER: Sure.

22 MR. OKOLI: Get the phone and then
23 we will call the judge.

24 MR. CLOPPER: Before we do, could
25 you read back the question for me.

1 McPHAIL

2 (Whereupon, the referred to
3 question was read back by the Reporter.)

4 MR. CLOPPER: Actually, I'm going
5 to allow the witness to answer this
6 question.

7 A. Can you repeat it?

8 MR. OKOLI: Can you read back the
9 question, please.

10 (Whereupon, the referred to
11 question was read back by the Reporter.)

12 A. No.

13 Q. How did you learn that Nigeria was
14 a source country?

15 MR. CLOPPER: Objection.

16 This answer calls for information
17 covered by the law enforcement privilege
18 and I'm instructing the witness not to
19 answer.

20 And I apologize, Mr. Okoli, for
21 going back and forth.

22 MR. OKOLI: That's okay.

23 MR. CLOPPER: On this one, I will
24 instruct the witness not to answer.

25 If I could have this question

1 McPHAIL

2 repeated back to me.

3 (Whereupon, the referred to
4 question was read back by the Reporter.)

5 MR. CLOPPER: Let's just go off the
6 record for a moment, in order to call
7 the judge.

8 (Whereupon, an off-the-record
9 discussion was held.)

10 JUSTICE PECK: This is Judge Peck.

11 MR. OKOLI: Good morning, Judge.
12 This is K.C. Okoli.

13 John, do you want to introduce
14 yourself.

15 MR. CLOPPER: And this is John
16 Clopper, Assistant United States
17 Attorney.

18 JUSTICE PECK: All right, and I
19 understand that you have got a court
20 reporter taking this down.

21 MR. OKOLI: Yes, Your Honor.

22 JUSTICE PECK: First, why don't you
23 fill me in on what happened last week,
24 when I was out of town.

25 I know that Judge Eaton ruled on

1

McPHAIL

2

question read back and the answer.

3

4

5

6

MR. OKOLI: Your Honor, just to clarify, Officer Mr. McPhail had been in the room all through us having this conversation.

7

8

JUSTICE PECK: Okay, I didn't know that, but that's fine.

9

10

MR. CLOPPER: That was an error, Your Honor. I apologize.

11

12

Can we have the question read back, please.

13

14

(Whereupon, the referred to question was read back by the Reporter.)

15

16

A. Okay, it was probably from a memo that came down from my supervisor.

17

18

19

MR. OKOLI: Your Honor, the witness responded, but I have a follow-up question.

20

JUSTICE PECK: Go ahead.

21

BY MR. OKOLI:

22

23

24

Q. When you say a memo from a supervisor, a supervisor at the airport or a supervisor somewhere else?

25

A. It would probably be a supervisor

1 McPHAIL

2 at the airport.

3 MR. OKOLI: Thank you.

4 MR. CLOPPER: Thank you, Your
5 Honor. That appears to be the end of
6 this line of questions.

7 JUSTICE PECK: Okay, very good.

8 Hopefully, no offense, folks, but I
9 hope I don't hear from you until I see
10 you on November 5th.

11 But if any other issues come up,
12 you are free to call. But know that you
13 are using up your time with the court,
14 so to speak.

15 All right, thank you both.

16 MR. CLOPPER: Thank you, Your
17 Honor.

18 (At 12:02 p.m. the examination
19 resumed.)

20 BY MR. OKOLI:

21 Q. To the best of your recollection,
22 the memo that you talked about, does it deal
23 with profiling?

24 MR. CLOPPER: Objection.

25 The question calls for information .

1 McPHAIL

2 covered by the law enforcement privilege
3 and I'm directing the witness not to
4 answer.

5 I thought we just talked about
6 that.

7 MR. OKOLI: Mark that for a ruling.

8 I will go ahead with my deposition
9 and have it marked for a ruling.

10 Q. Do you have a recollection of which
11 supervisor sent down this memo?

12 MR. CLOPPER: Objection.

13 The information calls for
14 information covered by the law
15 enforcement privilege and I'm
16 instructing the witness not to answer.

17 MR. OKOLI: Mark that for a ruling.

18 MR. CLOPPER: Actually, read back
19 that the last question.

20 (Whereupon, the referred to
21 question was read back by the Reporter.)

22 MR. CLOPPER: Okay, thank you.

23 MR. OKOLI: Your objection remains
24 the same?

25 MR. CLOPPER: Yes.

1 McPHAIL

2 (Whereupon, the referred to
3 question was read back by the Reporter.)

4 A. No.

5 MR. CLOPPER: While we are at it,
6 as I'm thinking about this, because I am
7 trying to be as cooperative as possible,
8 if you want to re-ask, we can go back to
9 the question, I think there was a
10 question about authorship on the memo,
11 if you want to re-ask that.

12 MR. OKOLI: I may come back to
13 that. Let me just finish with --

14 MR. CLOPPER: Sure.

15 MR. OKOLI: -- with the other
16 questions I have.

17 CONTINUED BY MR. OKOLI:

18 Q. Since you worked with Ms. Akinyemi,
19 did you know that she is Nigerian national
20 origin?

21 A. Yes.

22 Q. Could you briefly tell us under
23 what circumstances you learned that
24 Ms. Akinyemi was of Nigerian national origin?

25 A. I think she told me.

1 McPHAIL

2 Q. As you sit here today, do you know
3 who else she told she was of Nigerian national
4 origin?

5 A. Excuse me?

6 Q. As you sit here today, do you know
7 who else she may have told she is of Nigerian
8 national origin?

9 A. No, I don't know.

10 I have no knowledge of that.

11 Q. And when she told you this, she
12 didn't tell you that as a secret, it wasn't
13 something you could keep to yourself, correct?

14 A. No.

15 I mean, her voice and her accent, I
16 guess, people would assume she is from.

17 Q. But what I'm trying to get at, when
18 she said she was born in Nigeria, told you of
19 Nigerian national origin, it wasn't information
20 that was she imparting to you as a secret,
21 don't let anyone else know?

22 A. No.

23 Q. It was something in the open?

24 A. Yes.

25 MR. OKOLI: Could we go back to the